

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 2 1997

In the Matter of

Implementation of the Local Competition
Provisions in the Telecommunications Act
of 1996

CC Docket No. 96-98

Interconnection between Local Exchange
Carriers and Commercial Mobile Radio
Service Providers

CC Docket No. 95-185

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS ON
FURTHER NOTICE OF PROPOSED RULEMAKING

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October 2, 1997

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SUMMARY

USTA opposes any use of the Further Notice in this proceeding that would result in further erosion of the Commission's access charge system. The costs to incumbent LECs of such erosion could run into billions of dollars. The Further Notice requests comment on one issue: whether, under the 1996 Act, requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.

The Commission's existing restrictions regarding the use of local switching elements apply in this situation and should continue to do so. In the First Reconsideration Order in this proceeding, the Commission expressly held that a requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service. The issue raised in the Further Notice assumes that dedicated or shared transport service is offered "in conjunction with unbundled switching." The Commission's restrictions with respect to local switching elements apply directly.

The Commission's existing rule is an important means of implementing the intent of the 1996 Act. As the Eighth Circuit recognized in *Iowa Utilities Board v. FCC*, the 1996 Act created unbundled network elements to enable requesting carriers to provide local exchange service. The existing rule also enforces the established distinction between unbundled network elements and interstate access services. If the existing rule did not continue to apply, requesting carriers would be able to "mix and match" unbundled network elements and access services. Because of the price differences that will exist among these

offerings, the resulting regulatory arbitrage could eviscerate the Commission's access charge regime. This, in turn, would gravely threaten the present universal service system.

The existing rule of the First Reconsideration Order best reflects the role of unbundled network elements in the 1996 Act regarding local competition while supporting the access charge and universal service systems until they can be reformed. As such, it is consistent with the Eighth Circuit's decision in *CompTel v. FCC*. If any further clarification is needed, the Commission should state that requesting carriers may only use unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate traffic to customers to whom such carriers provide local exchange service.

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COMMENTS ON
FURTHER NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION

The United States Telephone Association ("USTA") hereby comments on the Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned proceeding.^{1/}

The Further Notice requests comment on one issue, which has been the subject of *ex parte* presentations before the Commission: whether, under the Telecommunications Act of 1996 (the "1996 Act"), "requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll

^{1/} See Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 95-185, FCC 97-295 (rel. Aug. 18, 1997) ¶¶ 3, 60-74, 79 ("Further Notice"). Paragraphs 1-2, 4-59, and 75-78 of the foregoing release are referred to herein as the "Third Reconsideration Order."

traffic to customers to whom the requesting carrier does not provide local exchange service."^{2/}

USTA appreciates the Commission's release of the Further Notice to address in a systematic way some issues surrounding the use of unbundled dedicated and shared transport by requesting carriers. However, USTA is troubled by the relationship of the specific matter raised in the Further Notice and the Commission's decisions in the Third Reconsideration Order. USTA disagrees with that order's regulatory treatment of unbundled "shared transport" elements as substitutes for interstate exchange access services. Indeed, although the Further Notice does not propose a particular rule,^{3/} USTA opposes any use of this notice that would result in further erosion of the Commission's access charge system. The costs to incumbent LECs of such erosion could run into billions of dollars.

USTA believes that the Commission's existing restrictions regarding the use of local switching elements, adopted in the First Reconsideration Order in this docket,^{4/} continue, and should continue, to apply in this situation. In the First Reconsideration Order, the Commission expressly held that a requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide

^{2/} Further Notice ¶ 61.

^{3/} See *id.* ¶ 64.

^{4/} See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 11 FCC Rcd 13042 (1996) ("First Reconsideration Order") at 13047-13049.

local exchange service.^{5/} Because the issue raised in the Further Notice specifically assumes that dedicated or shared transport service is offered "in conjunction with unbundled switching," the Commission's restrictions with respect to local switching elements apply directly.

The Commission's existing rule is an important means of implementing the intent of the 1996 Act, which created unbundled network elements in order to enable requesting carriers to provide local exchange service, as recognized by the Eighth Circuit in its *Iowa Utilities Board* decision.^{6/} This rule also enforces the distinction, acknowledged in *Iowa Utilities Board* and in the Commission's Interconnection Order,^{7/} between unbundled network elements and interstate access services. Without application of the existing rule, requesting carriers would be able to "mix and match" unbundled network elements and access services. Because of price differences among these offerings, that practice could have the effect of gutting the Commission's access charge regime. Such a result would pose grave threats to the present universal service system, especially in light of the treatment of unbundled "shared transport" elements in the Third Reconsideration Order in this proceeding.

^{5/} See *id.* at 13049. In doing so, the First Reconsideration Order found that unbundled local switching elements contain line cards that are "often dedicated to a particular customer." See *id.* at 13048. After considering the rights of carriers that purchase local switching and the likely requests for service of end users served by those switching elements, the Commission found that such carriers "would be likely to provide all available services" requested by those users, such as local exchange service. *Id.*

^{6/} *Iowa Utilities Board v. FCC*, Nos. 96-3321, et al. (8th Cir. July 18, 1997) ("*Iowa Utilities Board*").

^{7/} See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (1996) ("Interconnection Order"), vacated in part and *aff'd in part sub nom. Iowa Utilities Board*, *supra*.

In contrast, the existing rule helps to preserve the policy goals of the 1996 Act, and thus is consistent with the Eighth Circuit's *CompTel* decision.^{8/}

The Commission's existing rule best reflects the role of unbundled network elements in the 1996 Act with respect to local competition while helping to preserve the access charge and universal service systems until they can be reformed. If the Commission believes that any further clarification is needed, it should state that requesting carriers may only use unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate traffic to customers to whom such carriers provide local exchange service.^{9/}

II. REQUESTING CARRIERS SHOULD ONLY BE ABLE TO PURCHASE UNBUNDLED DEDICATED OR SHARED TRANSPORT FACILITIES AND SWITCHING TO CARRY THE INTERSTATE TRAFFIC OF CUSTOMERS TO WHOM THEY PROVIDE LOCAL EXCHANGE SERVICE

Consistent with the Commission's treatment of unbundled local switching elements, requesting carriers should only be permitted to purchase unbundled dedicated or shared transport facilities in conjunction with unbundled switching to carry the interstate traffic of customers to whom they provide local exchange service. Application of this existing rule will best preserve the distinction between unbundled network elements, designed to provide unbundled access to incumbent LECs' networks, pursuant to section 251(c) of the 1996 Act,

^{8/} *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("*CompTel*").

^{9/} See Further Notice ¶ 61.

and interstate access services, designed to provide exchange access pursuant to Part 69 of the Commission's Rules.

In *Iowa Utilities Board*, the Eighth Circuit clearly stated the purpose of such unbundled access, and contrasted it with the purpose of interstate exchange access:

Interconnection and unbundled access [pursuant to Section 251] are distinct from exchange access because interconnection and unbundled access provide a requesting carrier with a direct hookup to and extensive use of an incumbent LEC's local network that enables a requesting carrier to provide local exchange services, while exchange access is a service that LECs offer to interexchange carriers [IXCs] without providing the interexchange carriers with such direct and pervasive access to the LECs' networks and without enabling the IXCs to provide local telephone services themselves through the use of the LECs' networks.^{10/}

Unbundled network elements, through which requesting carriers obtain interconnection and unbundled access to incumbent LECs' networks, are designed to enable those carriers to provide local exchange service, while interstate access services are not. The Interconnection Order distinguished unbundled network elements from access services consistent with this reading of the statute.^{11/}

^{10/} *Iowa Utilities Board*, *supra* note 6, slip op. at 32 n. 20. The Eighth Circuit also ruled that

[T]he FCC's jurisdiction over the access charges that LECs collect from interexchange carriers (IXCs) for terminating the IXCs' interstate toll calls on the LECs' networks does not imply that the Commission also has jurisdiction over the rates that incumbent LECs may charge competing local exchange carriers for interconnection with or unbundled access to the incumbent LECs' networks.

Id.

^{11/} For example, the Commission held that:

When IXCs purchase unbundled elements from incumbents, they are not purchasing exchange access 'services.' They are purchasing a different product, and that product
(continued...)

Continued application of the Commission's existing rule will enforce the established distinction between unbundled network elements and interstate access services. It will help ensure that requesting carriers are in fact engaged in -- and bear the risks of -- the enterprise for which the 1996 Act unbundled network elements to be used: the provision of local exchange service.

As the Further Notice acknowledges,^{12/} section 251(c)(3) requires incumbent LECs to provide access to unbundled network elements "for the provision of a telecommunications service."^{13/} However, because sections 251 and 252 of the 1996 Act expressly leave to the states authority over the pricing of unbundled network elements, it is clear that such elements are distinct from the interstate exchange access services regulated by the Commission. Moreover, nothing in the 1996 Act limits the Commission's ability, exercised in the First Reconsideration Order, to require requesting carriers to offer telecommunications services such as local exchange service as a condition for unbundled access to certain network elements.

If the Commission does not continue to apply its current rule, it effectively would transfer to the states the ability to regulate the rates for carriage of jurisdictionally interstate traffic. As the Eighth Circuit has ruled, the states, and not the Commission, have authority

^{11/}(...continued)

is the right to exclusive access or use of an entire element.

Interconnection Order ¶ 358.

^{12/} See Further Notice ¶ 61.

^{13/} 47 U.S.C. § 251(c)(3).

over the rates for unbundled network elements.^{14/} Although Commission officials have disputed the validity of this holding, if IXC's or other carriers are permitted to substitute shared or dedicated transport elements for interstate access, the Commission would relinquish to the states jurisdiction over the affected traffic.

The states, whose jurisdiction over intrastate services is secured by section 2(b) of the Communications Act, have no authority to "accept" interstate responsibilities and have not expressed a willingness to do so. Pursuant to the 1996 Act, under certain conditions the Commission can forbear from regulation of interstate access services. However, the Commission is not permitted to authorize requesting carriers to mischaracterize the jurisdictional nature of requested services in order to "mix and match" unbundled elements and access services on the basis of price.

Currently, incumbent LECs can only offer interstate services subject to comprehensive, and restrictive, Commission regulations.^{15/} If IXC's are able to substitute unbundled network elements for exchange access services at will, the Commission's voluminous access charge rules will remain in effect, but can be ignored by carriers choosing to acquire interstate access as unbundled network elements under state authority or through intrastate agreements. As a technical matter, a "mix and match" regime would cause

^{14/} See *Iowa Utilities Board*, *supra* note 6.

^{15/} Such rules include those of 47 C.F.R. Parts 36, 61 and 69, as well as regulations deemed necessary to protect against unreasonable discrimination, including limits on individual case basis pricing and the use of customized contracts by incumbent LECs.

substantial difficulties in identifying whether the affected traffic is associated with unbundled network elements or access services.^{16/}

Application of the Commission's existing rule also is necessary to address the pressing and complex transitional issues caused by implementation of the 1996 Act. Unbundled shared or dedicated transport, as defined in the Third Reconsideration Order, can be combined with unbundled switching elements to substitute for elements of traditional interstate exchange access services. The allegedly "cost-based" prices of these unbundled network elements are quite likely to be substantially lower than prices for interstate access, since, as the Eighth Circuit recognized in *CompTel*, aspects of the Commission's access charge system are not cost-based.^{17/} As a result, IXC's, which otherwise would pay interstate access charges, have strong incentives to "mix and match" unbundled transport and switching elements with access services offered pursuant to Part 69 of the Commission's Rules, based on their respective prices.

If the Commission does not retain its existing rule, such a "mix and match" scenario will jeopardize the interstate access charge regime by permitting unfettered regulatory arbitrage in the midst of the Commission's efforts to reform it.^{18/} Application of the existing rule, in contrast, will limit the severe strains that such activities could place on the access charge system until reform is well underway.

^{16/} Incumbent LECs would have to conduct expensive audits to do so. Moreover, it would be difficult to identify such important access charge concepts as the point-of-presence of an IXC that is purchasing a combination of unbundled elements and access services.

^{17/} See *CompTel*, *supra* note 8, 117 F.3d at 1073.

^{18/} See, e.g., *Access Charge Reform*, First Report and Order, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158 (rel. May 16, 1997).

A "mix and match" situation would not advance telecommunications competition. At most, it would permit IXC's to purchase unbundled transport from incumbent LEC's at nominally "cost-based" rates rather than purchase the access services of unaffiliated competitive access providers. There is no evidence that such shuffling within the access marketplace, which could merely result in transfers of wealth to IXC's, will provide any competitive benefits at all. Local service competition would not be enhanced.

The Commission's existing rule is also needed to preserve another important goal of the 1996 Act -- the provision of universal service. As the *CompTel* decision recognized, the subsidies necessary to achieve the universal service goals of section 254 of the 1996 Act are presently derived "at least in part" from existing non-cost-based interstate access charges.^{19/} If IXC's were to substitute unbundled transport and switching elements obtained pursuant to section 251(c)(3) in place of the interstate access services that they currently purchase, major sources of support for universal service would be eliminated because of the price differences among these offerings.

Under a mix-and-match regime, incumbent LEC's would face insuperable difficulties in continuing to meet the universal service obligations of the 1996 Act. These obligations continue to include, in many areas, the provision of below-cost local exchange service to residential customers. The Commission's existing rule will help limit such damage, without placing undue burdens on requesting carriers. Indeed, it would still be the case that requesting carriers would be able to obtain below-cost local exchange services for resale from incumbent local exchange carriers at wholesale rates, pursuant to section 251(c)(4) of the 1996 Act.

^{19/} See 117 F.3d at 1074.

By applying the existing rule, the Commission will address in large part the difficulties posed by the Commission's schedule for implementing universal service reform. Under the Commission's plan, the system of specific, predictable, and sufficient mechanisms to provide explicit universal service support required by section 254 of the 1996 Act will not be in place before January 1, 1999.^{20/} At least until that date, the Commission's existing rule will help maintain interstate access charges as a principal source of universal service support.

This approach is consistent with the *CompTel* decision. There, the Eighth Circuit upheld an interim rule in the Interconnection Order that permitted incumbent LECs to recover non-cost-based interstate access charges for interstate traffic "traversing the incumbent LECs' local switches for which [requesting] carriers pay unbundled local switching element charges."^{21/} Despite the fact that the 1996 Act requires the charges for such unbundled network elements to be, among other things, cost-based and non-discriminatory, the Eighth Circuit found that the interim requirement was a reasonable means of avoiding "serious disruption" of universal service for the nine-month period between the adoption of the Interconnection Order and the statutory deadline for the adoption of universal service rules under the Act.^{22/}

Similarly, the Commission's existing rule addresses the even more complex transitional issues that exist at present. Currently, there are (1) substantial disparities

^{20/} See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997).

^{21/} Interconnection Order ¶ 720.

^{22/} See 117 F.3d at 1074.

between the prices for unbundled network elements such as switched and dedicated transport and interstate access services, (2) important policy reasons for the current price levels of access services, and (3) ongoing Commission access reform and universal service proceedings that will fundamentally change the pricing of each type of service. The Commission's existing rule, consistent with the interim rule upheld in *CompTel*, seeks to maintain the goals of the 1996 Act until this complex environment stabilizes.

The First Reconsideration Order's analysis of issues associated with the use of unbundled local switching elements provides sound guidance with respect to requesting carriers' use of dedicated or shared transport facilities in conjunction with switching. As noted above, the First Reconsideration Order held that a requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service. Thus, the First Reconsideration Order explicitly conditioned use of local switching elements on the requesting carrier's provision of local exchange service to end users. In doing so, the First Reconsideration Order followed the Interconnection Order's analogous holding that "a carrier must, at least with respect to unbundled loops, provide an end user all of the services that the end user requests," including local exchange service.^{23/}

A similar analysis applies as well to a requesting carrier's use of dedicated and switched transport elements in conjunction with switching. In the competitive environment being created by the 1996 Act, requesting carriers will likely seek to differentiate themselves from their competitors through marketing and advertising to end users, and by offering "one-

^{23/} *Id.* at 13048, 13049 (citing Interconnection Order ¶ 357).

stop shopping" for integrated packages of services. The IXC's of today manifest such behavior even though interexchange competition is not necessarily robust. As a practical matter, end users increasingly will expect to be able to obtain local exchange service from requesting carriers, as the Commission found to be the case for such carriers that purchase local switching elements. The Commission's existing rule, like that of the First Reconsideration Order, is consistent with this market process.

III. CONCLUSION

For the reasons discussed above, the Commission should apply its existing rule, adopted in the First Reconsideration Order, in order to prohibit requesting carriers from using unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate traffic for customers unless those carriers provide local exchange service to the affected customers.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By: 

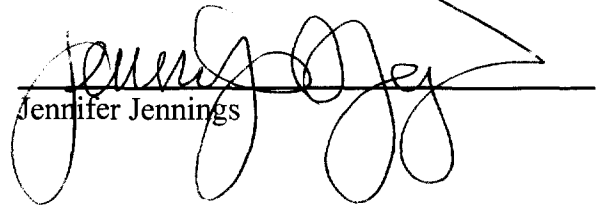
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October 2, 1997

CERTIFICATE OF SERVICE

I, Jennifer Jennings, do certify that on October 2, 1997 copies of the foregoing Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.


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